Supreme Court, U.S.
FILED

06-866 NOV 15 2006

OFFICE OF THE CLERK

NO_____

IN THE
SUPREME COURT OF THE UNITED STATES

**SHERRI YAX, BRIAN TRAYNOR,
and PATRICK DZAGULONES,
Petitioners**

v

**UPS a/k/a UNITED PARCEL SERVICE
and LIBERTY MUTUAL INSURANCE
COMPANY, foreign corporations,
Respondents**

PETITION FOR WRIT OF CERTIORARI

Marshall Lasser
MARSHALL LASSER PC
Attorney for Petitioners
P.O. Box 2579
Southfield MI 48037
248-647-7722

QUESTION PRESENTED FOR REVIEW

MUST A PLAINTIFF IN A CIVIL RICO CASE BROUGHT UNDER 18 U.S.C. §1964(C), WHO ALLEGES MAIL FRAUD IN VIOLATION OF 18 U.S.C. §1341, PLEAD COMMON LAW FRAUD?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

PLAINTIFFS

Sherri Yax, Brian Traynor, and Patrick Dzagulones

DEFENDANTS

UPS (formerly United Parcel Service) and Liberty Mutual Insurance Company

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF CITED AUTHORITIES ..... II/III

CITATION OF ORDERS IV

BASIS FOR JURISDICTION VI

THE STATUTES INVOLVED IN THE CASE VII

STATEMENT OF THE CASE 1

ARGUMENT 5

TABLE OF CITED AUTHORITIES

CASES

Abels v Farmers Commodities Corp, 259 F 3d 910, 918 (8th Cir 2001) *18*

Anza et al v Ideal Steel Supply Corp, 547 US ___ (04-433, June 5, 2006) *1*

Associated General Contractors of Cal., Inc. v Carpenters, 459 US 519, 529 (1983) *16*

Bender v Southland Corp, 749 F2d 1205 (6th Cir 1984)..... *3*

County of Suffolk v. Long Island Lighting Co., 907 F. 2d 1295, 1311-1312 (CA2 1990) *17*

Holmes v Security Investors Protection Corp, 503 US 258, 112 S Ct 1311, 117 L Ed 2d 532 (1992) *2*

Mid Atlantic Telecom, Inc v Long Distance Services, Inc, 18 F 3d 260, 263 (4th Cir 1994)..... *21*

Neder v United States, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999) *1,13*

Procter & Gamble Company v Amway Corp, 242 F3d 539,546-5 (5th Cir 2001) *20*

Schmuck v United States, 489 US 705, 109 S Ct 1443, 103 L Ed 2d 734 (1989, rehearing denied, 490 US 1076 (2001) *19*

Schreiber Distributing v Serv-Well Furniture Co, 806 F2d 1393, 1400 (9th Cir 1986) *19*

Sedima, S.P.R.L. v Imrex Co, Inc. 473 US 479, 488; 105 S Ct 3275, 3281; 87 L Ed2d 346 (1985) *13*

Systems Management, Inc, v Loiselle, 303 F 3d 100, 104 (1st Cir 2002) *20*

Tabas v Tabas, 47 F3d 1280, 1297 (3rd Cir 1995) ... *14, 19*

Taffet v. *Southern Co.,* 930 F. 2d 847, 856-857 (CA11 1991) *17*

STATUTES

United States Code:

18 U.S.C. §1851 3,23
18 U.S.C. §1961 1,4,6
18 U.S.C. §1961(1) 7
18 U.S.C. §1961(1)(B) and (D) 17
18 U.S.C. §1962(c) 3,11
18 U.S.C. §1964 11
18 U.S.C. §§1341 1,13,18,19
18 U.S.C. §§1341, 1343 7
28 U.S.C. §1332 4

Michigan Compiled Laws sections:

418.101 5,8
418.631(1) 22
418.801 6,22

RULES

Michigan Workers Compensation Administrative Rule 408.33 6,10,22

CITATIONS OF THE LOWER COURTS' OPINIONS AND ORDERS

SHERRI TAX, BRIAN TRAYNOR and PATRICK DZAGULONES, Plaintiffs-Appellants v UPS a/k/a UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE COMPANY, Defendants-appellees, United States Court of Appeals for the Sixth Circuit, case no. 05-1843,

OPINION & ORDER filed August 24, 2006

SHERRI YAX, BRIAN TRAYNOR and PATRICK DZAGULONES, Plaintiffs, v UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE CO., Defendants, case no. 03-72106,

MEMORANDUM OPINION & ORDER GRANTING DEFENDANT UNITED PARCEL SERVICE'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6), dated May 27, 2005.

SHERRI YAX, BRIAN TRAYNOR and PATRICK DZAGULONES, Plaintiffs, v UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE CO., Defendants, case no 03-72106,

JUDGMENT dated May 27, 2005,

SHERRI YAX, et al, Plaintiff v UNITED PARCEL SERVICE, et al, Defendant, case no, 03-CV-72106DT,

ORDER DENYING PLAINTIFF'S MOTION TO FILE THIRD AMENDED COMPLAINT, dated March 18, 2005

SHERRI YAX, BRIAN TRAYNOR, HEIDI WALLACE, DANIEL HOLCOMB, and PATRICK DZAGULONES, Plaintiffs, v UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE CO., Defendants, case no 03-CV-72106,

MEMORANDUM OPINION AND ORDER RE: DEFENDANTS', UNITED PARCEL SERVICE'S, AND LIBERTY MUTUAL INSURANCE COMPANY' S, MOTION TO DISMISS & PLAINTIFFS' MOTION TO AMEND COMPLAINT, dated March 31, 2004

V

BASIS FOR JURISDICTION

1. The judgement of the Court of Appeals was entered August [illegible] 2006.

2. Jurisdiction to review this writ exists under 28 U.S.C. §2101

THE STATUTES INVOLVED IN THE CASE

Federal: The Racketeer Influenced Corrupt Organization Act (RICO) sections 18 U.S.C. 1961 and 18 U.S.C. 1962(c); 18 U.S.C. §1341 (relating to mail fraud), 18 U.S.C. §1343 (relating to wire fraud)

State: Michigan Workers Disability Compensation Act, MCL 418.101 et seq, sections 301, 315, 631, 801

STATEMENT OF THE CASE

This case presents a major question arising under the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO): whether plaintiffs in a civil suit who claim they are victims of mail fraud must allege common law fraud - ie, that a misrepresentation was made to them upon which they relied to their detriment. The Court of Appeals for the Sixth Circuit so ruled, and granted defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim. Six other Circuits disagree, holding that reliance by the target of the scheme is not required by RICO. Some of the Circuits have ruled, and plaintiffs argue here, *RICO requires only that mail fraud victims allege they are the direct victims of a scheme to defraud which is indictable under 18 U.S.C. §1341.* Still other Circuits have held that a civil RICO mail fraud claim is stated when plaintiffs allege they are the direct victims of a misrepresentation made to a third person, as part of a scheme to defraud indictable under 18 U.S.C. §§1341. If either of these rules rule is adopted by the Court, the decision of the Sixth Circuit must be reversed.

In addition, the decision of the Sixth Circuit is incompatible with *Neder v United States*, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999), which held that reliance is not required for an act to be indictable under the mail fraud statute.[1]

Two months before the Sixth Circuit dismissed plaintiffs' appeal, this Court decided *Anza et al v Ideal*

---

1. Plaintiffs arguments throughout this brief are intended to apply to both the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, but for brevity plaintiffs will use only the term "mail fraud."

Steel Supply Corp , 547 US ___ (04-433, June 5, 2006). Defendant in that case requested this Court to hold "that a plaintiff may not assert a RICO claim predicated on mail fraud or wire fraud unless it demonstrates it relied on the defendant's misrepresentations." The Court said that because the plaintiff "has not satisfied the proximate-cause requirement articulated in *Holmes* [*v Security Investors Protection Corp*, 503 US 258, 112 S Ct 1311, 117 L Ed 2d 532 (1992)] , we have no occasion to address the substantial question whether a showing of reliance is required." *Anza*, id, slip opinion 9.

This "substantial question" is squarely presented here, because Mrs. Yax and her co-plaintiffs have satisfied the proximate-cause requirement articulated in *Holmes*, yet the Sixth Circuit dismissed the case because it held plaintiffs did not plead reliance on a misrepresentation by the defendants.

This petition should be granted because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court" (SC Rule 10(c)), and because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" (SC Rule 10(a)).

Plaintiffs in this case are employees of UPS who claim they were injured on the job, entitling them to workers compensation benefits under Michigan's Workers Disability Compensation Act ("WDCA"), Michigan Compiled Laws 418.101 et. seq., from UPS and its insurer Liberty Mutual ("Liberty"). The benefits consisted of weekly wage loss checks and payment of medical care for their injuries. Plaintiffs alleged a scheme by defendants to fraudulently deprive them of their benefits. This scheme used the mails in two ways:

(1) Liberty, acting in concert with UPS, mailed

fraudulent Notices of Dispute to them and to the Michigan Workers Compensation Agency, which administers the WDCA; the Notice of Dispute is a form which an insurer is required to file with the Agency when it terminates or denies benefits. The Notices of Dispute gave false explanations for the denial or termination of benefits to the plaintiffs.

(2) Liberty, acting in concert with UPS, obtained and mailed false medical reports from doctors. Liberty cited these false reports in Notices of Dispute as the basis for terminating or denying benefits.

Each of these acts involved mail fraud in violation of 18 U.S.C. §1341. Plaintiffs alleged defendants' fraudulent acts directly and immediately injured them because upon the mailing of the Notices of Dispute Liberty cut off or denied their weekly wage loss checks and medical care, and caused them attorney expense to recover those benefits.

Plaintiffs brought suit in the United States District Court for the Eastern District of Michigan, alleging a civil RICO cause of action under 18 U.S.C. §1962(c), which provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise... to conduct or participate... directly in the conduct of such enterprise's affairs through a pattern of racketeering activity...

18 U.S.C. §1851 states:-

> As used in this chapter -
>
> (1) "rac keteering activity" means..... (B) any act which is indictable under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).....

Defendants filed a motion to dismiss under Rule

12(b)(6), asserting, inter alia, that plaintiffs failed to plead common law fraud, citing *Bender v Southland Corp,* 749 F2d 1205 (6th Cir 1984). *Bender* held a civil RICO plaintiff must allege he detrimentally relied on a misrepresentation made to him. The District Court, relying on *Bender*, granted the motion, holding, inter alia, that plaintiff failed to plead common law fraud. (Apx 9, 21) The Court of Appeals affirmed, citing *Bender.* (Apx 1)

Basis for Federal Jurisdiction in the District Court

Federal question jurisdiction is conferred on plaintiffs' claims by the Federal Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 U.S.C. §1332 (plaintiffs are citizens of Michigan, defendants are citizens of other states, and the amounts in controversy exceed $75,000).

ARGUMENT

Background and Procedural History

Sherri Yax, Bryan Traynor and Patrick Dzagulones were injured while working for UPS (formerly United Parcel Service). They sought Michigan workers compensation benefits from defendants. Liberty Mutual Insurance Company insured UPS for those benefits and, with the assistance of UPS, adjusted workers compensation claims made against UPS.

Michigan's workers compensation scheme was established by the Worker's Disability Compensation Act ("WDCA"), Michigan Compiled Laws ["MCL"] 418.101 et. seq.. Section 301(1) of the WDCA provides that an "employee who receives a personal injury arising out of the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." (Apx 60) Section 315 provides that the "employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical...and medicines... when they are needed." (Apx 60)

Section 801 of the WDCA provides for sanctions against an employer and its insurer if benefits are not paid promptly to the injured employee. However, an insurer may avoid sanctions by filing a Notice of Dispute with the Workers Compensation Agency (the "Agency"):

> Sec. 801 (1) Compensation shall be paid promptly and directly to the person entitled thereto and shall become due and payable on the fourteenth day after the employer has notice or knowledge of the disability or death, on which date all compensation then accrued shall be paid.

> (2) If weekly compensation benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable, in cases where there is not an ongoing dispute, $50 per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid. [MCL 418.801]

A claims adjuster seeking to deny or terminate an employee's benefits must file a Notice of Dispute with the Agency (formerly the Bureau of Workers Disability Compensation) and send a copy to the employee. The manner and method of disputing a claim via a Notice of Dispute is set out in Administrative Rule R408.33:

> Rule 3 (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier... shall notify the bureau, on form 107, if the right of the injured employee or dependant to compensation is disputed.... A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

A Notice of Dispute form is in the Appendix at 52.

Sherri Yax, Bryan Traynor, Patrick Dzagulones and three other UPS employees who have since dismissed their claims brought suit on May 29, 2003, pursuant to §1964(c) of the federal Racketeer Influence and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961, et. seq.. RICO Section 1964(c) provides in part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee... (Apx 53)

Plaintiffs alleged UPS and Liberty Mutual fraudulently deprived them of their workers compensation

benefits through a "pattern of racketeering activity" in violation of §1962(c), which provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise' s affairs through a pattern of racketeering activity or collection of unlawful debt. (Apx 53)

Yax and the other plaintiffs alleged UPS and Liberty Mutual committed a series of "predicate acts" of "racketeering activity" involving mail and wire fraud in violation of 18 U.S.C. §1961(1) of the RICO statute. §1961(1) defines "racketeering activity" to include "any act which is indictable" under the mail and wire fraud provisions of title 18 of the United States Code, §§1341 and 1343.

Plaintiffs filed a First Amended Complaint (Apx 42), which alleged in part that UPS and Liberty "formed an "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO)". This enterprise schemed to defraud them of their workers compensation benefits. Plaintiffs alleged defendants:

> 7. ...committed... mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently terminating or denying benefits, or by fraudulently terminating benefits because a person refused to settle a claim for the amount offered by Liberty Mutual. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 U.S.C. 1341 and 1343...

Each plaintiff alleged the particulars of his or her causes of action. Sherri Yax's allegations are representative:

9. In late 2001 and in 2002, Liberty Mutual received reports from not one but three physicians, Drs. David Carr, Phillip Friedman and Dale Hoekstra, each saying that plaintiff remained disabled from her job because of lumbosacral symptoms and pathology. These reports indicated that plaintiff's disabling symptoms and or pathology were caused or at least partly caused (aggravated) by work Because plaintiff's disability was partly caused by work, it was fully compensable under the Michigan Workers Disability Compensation Act, MCL 418.101 et seq.

***

12. On September 17, 2002, Liberty Mutual filed a Notice of Dispute with the Michigan Bureau of Workers Disability Compensation, stating" No medical evidence for continued disability." Pursuant to this Notice of Dispute, Liberty ceased paying workers compensation benefits.

13. At the time Liberty filed the notice of dispute, it possessed multiple medical reports stating plaintiff continued to be disabled. These reports were also in the possession of the workers compensation claims officials at UPS...

***

16. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

***

18. Defendants' violation of RICO caused plaintiff to be wrongfully deprived of

Michigan workers compensation benefits.

Each plaintiff alleged defendants' scheme caused them attorney expenses to recover their benefits, as well as loss of the benefits.

Defendants filed Motions to Dismiss under civil procedure Rule 12(b)(6), failure to state a claim upon which relief can be granted. The district court on March 31, 2004 issued an order which (1) dismissed all counts against Liberty Mutual under the McCarran-Ferguson Act, 15 U.S.C. §1012(b); (2) held each plaintiff failed to plead an actionable RICO claim against UPS; and (3) granted plaintiffs leave to amend their claims against UPS to meet the RICO pleading defects found by the court. (Mar. 31, 2004 Memorandum Opinion at 25-26, Apx pg 21)

The court also said that in a RICO claim alleging mail or wire fraud, plaintiffs

> "...cannot maintain a civil RICO claim against these defendants absent evidence that the Defendants made misrepresentations or omissions of material fact to the Plaintiffs and evidence that Plaintiffs relied on these misrepresentations or omissions to its [sic] detriment. See *Bender v Southland Corp,* 749 F2d 1205, 1216 (6th Cir 1984)..." *Id,* at 12.

The court added,

> "Since Plaintiffs' Complaint not only does not demonstrate reliance, but does not indicate that any of the alleged fraudulent communications were communicated directly or indirectly to the Plaintiffs, Plaintiffs' RICO cause of action must fail absent amendment of the Complaint." (*Id.* at 18, 19).

In response to the court's grant of leave to amend, plaintiffs filed their Second Amended Complaint against both UPS and Liberty Mutual (Apx 26). The Second Amended Complaint alleged Liberty mailed Notices of Dispute directly to the plaintiffs, pursuant to Michigan

Administrative Rule 408.33, which requires the insurer to mail a copy to the injured worker when the original is filed with the Agency (Apx 60). However, the amended complaint did not show that plaintiffs relied on the Notices of Dispute to their detriment, except insofar as they had to hire a lawyer to sue for their benefits.

Each of the plaintiffs did allege that defendants' fraud proximately injured him or her. For example, Patrick Dzagulones alleged in the Second Amended Complaint:

> 30. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees... (Apx 26)

Similar allegations were made by Yax and Traynor.

Defendants renewed their Rule 12(b)(6) motions to dismiss for failure to state a claim, asserting plaintiffs failed to allege common law fraud. The District Court agreed and granted the motions, citing *Bender*, supra, among other grounds (Apx 9). The court held that plaintiffs' allegation that they relied on defendants' misrepresentations, in that they suffered the expense of hiring a lawyer to regain their benefits, was not an allegation of detrimental reliance. The Sixth Circuit affirmed (Apx 1).

I.

A CIVIL RICO PLAINTIFF WHO ALLEGES VIOLATION OF THE MAIL FRAUD STATUTE SHOULD NOT BE REQUIRED TO ALLEGE HE RELIED ON DEFENDANTS' MAILED MISREPRESENTATION MADE TO HIM, WHERE HE ALLEGES DEFENDANTS' FRAUDULENT SCHEME DIRECTLY INJURED HIM, AND THE MAILS WERE USED IN THE FURTHERANCE OF THE SCHEME.

The Racketeer Influenced Corrupt Organization Act (RICO) provides at 18 U.S.C. §1962(c), Prohibited Activities:

> (c) It shall be unlawful for any person employed by or associated with any enterprise... to conduct... such enterprise' s affairs through a pattern of racketeering activity... (Apx 53)

§1961(1) defines "racketeering activity" to include "any act which is indictable" under the mail fraud statute of title 18 of the United States Code, §1341. Mail fraud is, in the parlance of RICO litigation, a predicate act. A plaintiff is required by §1962(c) to allege a sufficient number of predicate acts of racketeering to form a "pattern of racketeering activity." (Apx 53)

Sherri Yax, Brian Traynor and Patrick Dzagulones alleged UPS and Liberty Mutual committed mail fraud in a pattern of racketeering activity, fraudulently depriving them of their workers compensation benefits. They sought a civil remedy under 18 U.S.C. §1964.

Plaintiffs argue their pleadings sufficiently alleged mail fraud because they showed Liberty's and UPS's fraudulent scheme directly deprived them of workers' compensation benefits, and defendants used the mails in

furtherance of that scheme. *Plaintiffs need not show the mailings misrepresented anything; innocent mailings in furtherance of a scheme to defraud should be sufficient in a civil RICO action based on the mail fraud statute.*

Alternatively, plaintiffs argue their pleadings alleged mail fraud because they alleged defendants did mail misrepresentations, to a third person (the Workers Compensation Agency), which proximately injured them. The misrepresentations need not have been made directly to the plaintiffs, and the plaintiffs need not have relied on them, as long as the misrepresentations proximately damaged the plaintiffs.

The Sixth Circuit rejected plaintiffs' claims because in 1984 it held the plaintiffs cannot maintain a civil RICO action absent allegations of common law fraud. The plaintiffs must allege defendants made misrepresentations or omissions of material facts to them, and they relied on those misrepresentations or omissions to their detriment, *Bender v Southland Corp*, 749 F2d 1205, 1216 (6th Cir 1984). Plaintiffs asked the Sixth Circuit to overturn *Bender*, but the court answered:

> This, we are forbidden to do. In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.

Plaintiffs now ask this court to overrule the Sixth Circuit rule requiring them to allege common law fraud, because *Bender* conflicts with -

A. the express language of RICO;

B. the remedial purpose of RICO;

C. this Court's statement in *Holmes*, supra, at footnote 19, that a RICO civil suit may be maintained despite the absence of common law fraud where plaintiffs can prove proximate cause;

and
D. decisions of other courts of appeal.

A.

THE RICO STATUTE REQUIRES A PLAINTIFF TO ALLEGE AN ACT "I NDICTABLE" UNDER THE MAIL FRAUD STATUTE, NOT COMMON LAW FRAUD

The RICO statute does not contain a requirement that plaintiff allege common law fraud.

§1961(1) defines "racketeering activity" to include an act "indictable" under18 U.S.C. §1341. This Court has held that common law fraud is not required for an act to be indictable in a RICO prosecution alleging violation of the mail fraud statute. Reliance on a misrepresentation is not required, *Neder v US*, 527 US 1, 119 S Ct 1872, 144 L Ed 2d 35 (1999).

Nothing in the RICO statute places a higher burden on plaintiff in a civil suit than is placed upon the government in a prosecution. *Neder*, supra, said

> The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes. See, eg, United States v Stewart, 872 F. 2d 957, 960 (CA 10 1989) ("[Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant's misrepresentations"); United States v Rowe, 56 F. 2d 747, 749 (CA 2 1932) (L. Hand, J) ("Civilly of course the [mail fraud statute] without proof of damage, but that has no application to criminal liability"), cert denied, 286 US 554, 52 S Ct 579, 76 L Ed 1289 (1932). *Neder*, supra, 527 US at 24.

The text of the RICO statute is instructive on the issue of whether reliance or a mailed false statement are requirements of a civil action. Section 18 U.S.C. §1851 states

> "racketeering activity" means..... (B) *any act which is indictable* under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).....

Congress did not say that a plaintiff in a civil suit must allege more than the government is required to allege in a prosecution. Congress said a plaintiff must allege an "act which is indictable." Because the government in a mail fraud prosecution is not required to allege reliance, *Neder*, supra, or even a mailed misrepresentation, *Schmuck v United States*, 489 US 705, 109 S Ct 1443, 103 L Ed 2d 734 (1989), rehearing denied, 490 US 1076 (2001), neither are Mrs. Yax nor her co-plaintiffs in their civil suit.

Bender, supra, demands plaintiff allege more than RICO requires. *Bender* conflicts with the express language of the statute and should be reversed.

B.
CONGRESS' COMMAND THAT THE RICO STATUTE SHALL BE "LIBERA LLY CONSTRUED TO EFFECTUATE ITS REMEDIAL PURPOSE" IS AN IMPORTANT REASON TO REJECT *BENDER'S* REQUIREMENT THAT A PLAINTIFF TO ALLEGE COMMON LAW FRAUD

Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," §904(a) of Pub. L. No 91-452, 84 Stat. 947, 18 U.S.C. §note. "Indeed,

if Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v Imrex Co, Inc.*, 473 US 479 at 491 n. 10; 105 S Ct 3275 at 3283 n. 10; 87 L Ed 2d 346 at 356 n. 10. "The statute's remedial purposes are nowhere more in evidence than in the provision of a private action for those injured by racketeering activity." *Sedima*, supra, 473 US at 498, 105 S Ct at 3286, 87 L Ed 2d at 360. *Bender's* restriction of private actions conflicts with *Sedima's* encouragement of private actions.

The statute was intended to reach not only mobsters, the Court said in *Sedima*, but also legitimate businesses which scheme dishonestly. "Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope." *Tabas v Tabas*, 47 F3d 1280, 1297 (3rd Cir 1995).

C.

THIS COURT INDICATED IN FOOTNOTE 19 OF *HOLMES*, SUPRA, THAT RELIANCE BY A PLAINTIFF ON A MISREPRESENTATION MADE TO HIM WAS NOT REQUIRED IF HE PROVED HE WAS PROXIMATELY INJURED BY DEFENDANT'S FRAUD

Proximate cause is the key. *Holmes* required direct injury before a person could bring a RICO claim, and indicated that once the direct injury requirement was satisfied, the victim of a fraudulent scheme should be able to allege violation of the mail and wire fraud statutes. The Court indicated in footnote 19 that reliance by plaintiffs on a misrepresentation made to them was not a civil RICO requirement. Mrs. Yax and her co-plaintiffs plausibly alleged they were the direct victims of defendants' fraudulent scheme, and their claims should not have been dismissed.

In *Holmes*, the Securities Investor Protection

Corporation (SIPC), and trustees appointed to liquidate the securities of a bankrupt broker which was an SIPC member, First State Securities Corporation (FSSC), brought suit against Robert Holmes Jr, claiming he participated in a fraudulent scheme leading to the demise of FSSC, which caused SIPC to advance $13 million to cover the claims of FSSC's customers. The suit claimed Holmes violated the mail and wire fraud statutes, and that the acts of Holmes and his co-conspirators amounted to a pattern of racketeering under RICO. The district court dismissed the claims of the SIPC and the trustees on the ground, inter alia, that plaintiff had not satisified the proximate cause requirement under RICO. The United States Court of Appeals for the Ninth Circuit reversed and remanded. This court granted Holmes' petition on the issue " whether SIPC had a right to sue under RICO."

This court noted that a RICO plaintiff must show that defendant's violation was a proximate cause of his injury. The court fleshed out this term of legal art:

> Here we use "proxima te cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Low of Torts, §41, P. 264 (5th ed. 1984). Accordingly, among the many shapes this concept took at common law, see *Associated General Contractors [of Cal., Inc. V Carpenters,* 459 US 519, 529 (1983)], supra, at 532-533, was a demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a

distance to recover.

Holmes applied this concept to deny SIPC and the trustees the right to sue under RICO, holding that "the link is too remote" between the actions of the alleged conspirators and the harm suffered by the customers of the defunct brokerage, FSSC. The acts of defendants did not result in a "direct injury" to the customers. These customers, in whose shoes SIPC stood, were "s econdary victims" of the conspiracy, and their damages were at best very difficult to assess because of their remoteness in the chain of causation between the conspiracy and their loss.

Of critical importance to this case is footnote 19 of *Holmes,* which indicates that a scheme such as Mrs. Yax and her co-plaintiffs allege may meet both the proximate cause and pleading requirements of RICO, even though common law fraud is not alleged .

> We further note that SIPC alleged in the courts below that, in late May 1981, Joseph Lugo, an officer of FSSC and one of the alleged conspirators, parked manipulated stock in the accounts of customers, among them Holmes, who actively participated in the parking transaction involving his account. See Statement of Background and Facts, 1 App. 223-225. Lugo "sold" securities owned by FSSC to customers at market price, and "bought" back the same securities some days later at the same price plus interest. Under applicable regulations, a broker dealer must discount the stock it holds in its own account, see 17 CFR § 240.15c3-1(c)(2)(iv)(F)(1)(vi) (1991), and the sham transactions allowed FSSC to avoid the discount. But for the parking transactions, FSSC would allegedly have failed capital requirements sooner; would have been shut down by regulators; and would not have dragged Sebag with it in its demise. 1 App. 231. Thus, their customers would have been

> injured to a lesser extent. *Id.*, at 229, 231. We do not rule out that, if, by engaging in the parking transactions, the conspirators committed mail fraud, wire fraud, or "fraud in the sale of securities," see 18 U.S.C. §§ 1961(1)(B) and (D) (1988 ed., Supp. I), the broker dealers' customers might be proximately injured by these offenses. See, *e. g., Taffet* v. *Southern Co.*, 930 F. 2d 847, 856-857 (CA11 1991); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F. 2d 1295, 1311-1312 (CA2 1990). However this may be, SIPC in its brief on the merits places exclusive reliance on a manipulation theory, and is completely silent about the alleged parking scheme.

The cited pages of *County of Suffolk* and *Taffet* approved RICO mail fraud complaints which did not allege common law fraud. In those cases, utility customers alleged utility officers made fraudulent representations in rate proceedings before state commissions, thereby causing unwarranted rate increases. The courts of appeal held the customers alleged proximate cause, even though no misrepresentations were made to them by defendants.

Bender, which restricts RICO mail fraud claims to common law fraud, conflicts with *Holmes'* approval of *County of Suffolk* and *Taffet*. Plaintiffs who plead an injury proximately caused by defendants' fraudulent scheme, *Holmes* indicates, plead a civil RICO cause of action even if they have not relied on a misrepresentation made to them.

D.

THE RULING OF THE SIXTH CIRCUIT CONFLICTS WITH THE DECISIONS OF SIX OTHER CIRCUITS

1. The Rule of the Third, Eighth, and Ninth Circuits

Several courts of appeal have held that a civil RICO suit alleging mail fraud does not require plaintiff to allege defendant committed an act of common law fraud, but that he allege only that defendant committed an act indictable under 18 U.S.C. §1341 which proximately injured him. Noting the broad reach of RICO, at least three circuits have held that a scheme may constitute civil RICO mail fraud it even if it does not involve *any* mailed misrepresentation, as long as plaintiff can show defendants' dishonest scheme proximately caused him loss, and the mails were used in furtherance of the scheme:

- *Abels v Farmers Commodities Corp,* 259 F 3d 910, 918 (8th Cir 2001): "A plaintiff may, but need not, allege that a defendant made misrepresentations of fact. [citation] Because misrepresentations of fact are not necessary to the offense, it follows that no misrepresentations need by transmitted by mail or wire; even routine business communications in these media may suffice to make a scheme of false dealing into a federal offense." *Id*, 918.
- *Schreiber Distributing v Serv-Well Furniture Co*, 806 F2d 1393, 1400 (9th Cir 1986): Plaintiffs must show "(1) The defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the US mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud... This is consistent with the purpose of the statutes, which is to proscribe the use of the mails or wires in any situation where it is closely entwined with fraudulent activity."
- In *Tabas v Tabas,* 47 F3d 1280, 1294 (3rd Cir 1995), defendants were executors of an estate. The Third Circuit held that each time defendants made a questionable charge or received compensation to which they were not entitled, they committed acts of

—mail fraud. Citing *Schmuck v United States,* 489 US 705, 715, 109 S Ct5 1443, 1450, 103 L Ed 2d 734 (1989), the court held that completely innocent mailings in furtherance of this fraud can supply the mailing element in a RICO claim based on 18 U.S.C. §1341.

This Court should adopt the rule of these courts and hold that a mailed misrepresentation is not a required element of a civil RICO mail fraud claim. A plaintiff's pleadings should suffice where he alleges or shows a fraudulent scheme proximately caused him damage, and the mails were used in furtherance of the scheme. *Sedima's* injunction that RICO's civil action provision be liberally construed ordains such pleadings, and such pleadings satisfy *Holmes'* requirement that defendants' acts proximately harmed the plaintiff.

Mrs. Yax's and her co-plaintiffs' pleadings meet the requirements of the rule enunciated by the Eighth, Ninth, and Third Circuits, because they alleged Liberty and UPS cut off their benefits under false pretenses (claiming they had no proof of disability when they did, or obtaining false medical reports which said a plaintiff was not disabled when he was); (2) defendants mailed the Notices of Dispute and the medical reports in furtherance of the scheme; and (3) defendants' scheme directly deprived them of their workers compensation benefits and caused them attorney fee expense.

Plaintiffs' pleadings also satisfied this Court's concern, expressed in *Holmes,* supra, that a civil plaintiff plausibly allege he was directly damaged by defendant's fraud. Plaintiffs alleged they were the direct target of defendants's scheme, and that defendants directly injured them by cutting off or denying their benefits and causing them the expense of hiring an attorney to recover their benefits. Plaintiffs alleged proximate cause.

2. The Rule of the First, Fourth, and Fifth Circuits

Other circuits have required a plaintiff claiming

mail fraud to allege or show a mailed misrepresentation, but have held a mailed misrepresentation to a third person was sufficient. The Fifth Circuit held a plaintiff sufficiently alleged RICO mail fraud where the false statements were directed not to him but to customers in the marketplace in which he competed, which the customers relied on to the damage of plaintiff. *Procter & Gamble Company v Amway Corp,* 242 F3d 539, 546-5 (5th Cir 2001). Plaintiff alleged Amway Corporation lured away its customers by spreading false rumors that it was linked to Satanism. The court held this pleading sufficient:

> ....a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present. *Procter & Gamble,* supra, 565.

The First Circuit, in *Systems Management, Inc, v Loiselle,* 303 F 3d 100, 104 (1st Cir 2002) also held that false statements to a third person could constitute mail fraud, where they proximately damaged plaintiff. Plaintiffs, janitorial workers, alleged that Loiselle, owner of a janitorial service company, paid his workers less than the required prevailing wage to clean college offices, but falsely represented to the college that he paid the required wage. Plaintiffs filed a civil RICO case claiming they lost employment due to defendant's mail fraud. Loiselle asserted he was entitled to dismissal because plaintiffs had not pled reliance on the misrepresentations. The court rejected the argument:

> It is true that at common law, a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. But RICO bases its own brand of civil liability simply on the commission of specified criminal acts - here, criminal fraud - so long as they comprise a "pattern of racketeering activity"; and criminal fraud

> under the federal statute does not require 'r eliance' by anyone; it is enough that the defendant sought to deceive, whether or not he succeeded. See *Neder v United States*, 527 US 1, 119 S Ct 1872, 144 L Ed 2d 35 (1999). (" The common-law requirement[] of 'justifiable reliance' has no place in the federal fraud statutes.")
>
> ...Congress structured its civil remedy to allow recovery for harm caused by defined criminal acts, including violation of section 1341; and, as noted, the federal mail fraud statute does not require reliance. Thus, under a literal reading of RICO--the presumptive choice in interpretation--nothing more than the criminal violation and resulting harm is required.
>
> ***
>
> ...There is no good reason her to depart from RICO's literal language by importing a reliance requirement into RICO. *Id*, 303 F3d 104

See also *Mid Atlantic Telecom, Inc v Long Distance Services, Inc*, 18 F 3d 260, 263 (4th Cir 1994).

The pleadings of Mrs. Yax and her co-plaintiffs are sufficient under *Procter & Gamble*, *Summit*, *Atlantic Telecom* and *Systems Management*. They alleged or showed they were proximately injured by defendants' fraud, even though the misrepresentations were made to the Workers Compensation Agency and not to them.

The false statements contained in the Notices of Dispute issued by Liberty Mutual were directed to officials of the Michigan Workers Compensation Agency. Defendants conceded they mailed the Notices of Dispute to the Agency, and sent copies to plaintiff. (Trial court Opinion, May 27, 2005, at Apx 9) The statements misled the Agency as to the basis for defendants' cut-off of benefits. Liberty falsely and repeatedly represented to the Agency that there was a proper basis for the denial of

plaintiffs' benefits.

The false statements proximately injured plaintiffs. Because the Notices of Dispute did not tell the Agency the true and improper reasons for the cut-offs of benefits, the Agency took no action against Liberty, and Liberty was able to continue wrongfully withholding benefits[2]. Under *Procter & Gamble, Mid Atlantic Telecom* and *Systems Management*, Liberty's false statements to the Agency fulfill the misrepresentation requirement in a RICO claim of mail fraud.

However, the decisions of the Fourth, Fifth and First Circuits are not compatible with this Court's rulings insofar as they *require* reliance on a misrepresentation by a third person. Reliance on a misrepresentation is not a requirement of the mail fraud statute. *Neder*, supra, said so. "The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes." *Neder*, supra, 527 US at 24.

This Court should rule that a civil RICO plaintiff has

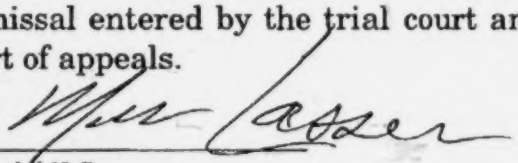
---

2 Plaintiffs claim that had the Notices of Dispute told the truth - for example, "Liberty Mutual is stopping Sherri Yax's benefits on the ground it has no proof of disability although it does have proof of disability" - the Agency would have taken action under §631(1) of the WDCA, MCL 418.631(1), which provides for revoking an insurer's Michigan license "if any insurer licensed to transact the business of workmen's compensation insurance within this state.... unreasonably fails to pay promptly claims for compensation for which it shall become liable." (Apx XXX) The Agency could also have taken action against Liberty under the penalty provision of §801 of the WDCA, MCL 418.801. (Apx XXX) Note also that the Notice of Dispute warns at the bottom of the form that "[m]aking a false or fraudulent statement for the purpose of... *denying benefits* can result in criminal or civil prosecution, or both..." and cites WDCA sections 801 and 631, as well as rule R408.33. (Apx XXX)

sufficiently plead a cause of action where he has alleged or showed defendants' fraudulent scheme directly caused him loss, and defendants used the mails or wires in furtherance of the scheme. Such a rule complies with the holdings of this court in *Neder*, *Schmuck*, *Sedima*, and *Holmes*, supra.

RELIEF REQUESTED

Sherri Yax, Bryan Traynor and Patrick Dzagulones request this court to hold their Second Amended Complaint alleged civil RICO causes of action for mail and wire fraud against Liberty Mutual and UPS, and to reverse the dismissal entered by the trial court and affirmed by the court of appeals.



Marshall Lasser
Attorney for petitioners

S:\wp51\DOCS\UPS\SupremeCourt\PetitionCover.wpd